

The Honorable Richard A. Jones
The Honorable J. Richard Creatura

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

EL PAPEL, LLC, et al.

Plaintiffs,

v.

JAY R. INSLEE, in his official capacity
as Governor of the State of Washington,
et al.,

Defendants.

NO. 2:20-cv-01323-RAJ-JRC

GOVERNOR JAY INSLEE'S
RESPONSE TO PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION

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I. INTRODUCTION

The COVID-19 pandemic is not only a public health crisis, but also an economic one. Because of the pandemic and the measures necessary to fight it, more than one million Washingtonians have filed unemployment claims and 140,000 have lost their jobs. The State has experienced the worst economic devastation since the Great Depression.

In response to this crisis, Defendant Governor Jay Inslee has issued emergency proclamations to slow COVID-19's spread and mitigate its economic hardships. Like the federal government and other states, the Governor issued a moratorium on most residential evictions (the Moratorium). Recognizing that the pandemic would leave many tenants in financial distress and at risk of eviction for nonpayment of rent, the Governor sought to keep people in their homes during this public health emergency. Eviction forces people into congregate settings such as homeless shelters and shared living quarters, where COVID-19 spreads most aggressively. With up to 740,000 Washingtonians at risk of eviction by the end of the year, epidemiological modeling projects that mass evictions would cause up to 21,100 more COVID-19 infections and 348 more deaths in the state. The Moratorium helps avoid these unacceptable losses.

Plaintiffs El Papel LLC, Berman 2 LLC and Karvell Li (together, the Landlords) are Seattle property owners with tenants owing unpaid rent. Wishing to evict their tenants during the pandemic, the Landlords filed this lawsuit alleging that the Moratorium violates the Contracts Clause and the Takings Clause of the federal Constitution. Seeking a preliminary injunction, the Landlords contend that their tenants' unpaid rent constitutes an irreparable injury outweighing the State's interest in protecting its residents from the disastrous social costs of mass evictions. The Landlords are wrong on the merits, wrong on irreparable harm, and wrong on the equities.

As a threshold matter, the Landlords' claims should be dismissed because the federal eviction moratorium leaves them without standing, and because the Governor is immune from this suit under the Eleventh Amendment. Even if their claims were justiciable, the Landlords are unlikely to prevail under traditional constitutional standards, let alone the more deferential

1 standard that applies to emergency public health measures. *See Jacobson v. Massachusetts*, 197
 2 U.S. 11 (1905). The Landlords cannot show irreparable harm because their injury—unpaid
 3 rent—is economic and compensable in damages. And however much the Landlords may wish
 4 to evict their tenants, their pecuniary interests pale in comparison to the paramount public interest
 5 in preventing the dire consequences of mass evictions during a pandemic: severe economic
 6 dislocations and a new wave of COVID-19 infections that would sicken or kill many thousands.

7 The Court should therefore join the growing consensus of federal courts that have
 8 uniformly rejected challenges to state and local COVID-19 eviction moratoria. *See, e.g., Baptiste*
 9 *v. Kennealy*, No. 1:20-cv-11335-MLW, 2020 WL 5751572, at *4 (D. Mass. Sept. 25, 2020)
 10 (denying motion for preliminary injunction against Massachusetts evictions moratorium and
 11 rejecting Contracts Clause and Takings claims); *HAPCO v. City of Phila.*, No. CV 20-3300,
 12 2020 WL 5095496, at *1 (E.D. Pa. Aug. 28, 2020) (same for Philadelphia evictions moratorium);
 13 *Auracle Homes, LLC v. Lamont*, --- F. Supp. 3d ----, No. 3:20-cv-00829, 2020 WL 4558682,
 14 at *1 (D. Conn. Aug. 7, 2020) (same for Connecticut evictions moratorium); *Elmsford Apt.*
 15 *Assocs., LLC v. Cuomo*, No. 20-cv-4062 (CM), 2020 WL 3498456, at *1 (S.D.N.Y. June 29,
 16 2020) (entering summary judgment against Contracts Clause and Takings claims).

17 II. FACTUAL BACKGROUND

18 A. The COVID-19 Pandemic

19 The SARS-CoV-2 virus that causes COVID-19 is highly contagious and potentially fatal.
 20 Declaration of Dr. Kathy Lofy (Lofy Decl.) ¶¶ 6–7. Seniors and persons with medical conditions
 21 are most vulnerable to complications and death, and people of color disproportionately contract
 22 and experience severe COVID-19 health outcomes. *Id.* ¶¶ 7–8. The virus spreads primarily
 23 through close interactions via respiratory droplets. *Id.* ¶ 6. There is a lag of several days before
 24 the onset of symptoms. Declaration of Brian Rowe (Rowe Decl.), Ex. A. Some with COVID-19
 25 experience no symptoms, so an infected person may spread it unknowingly. *Id.*

26 On January 21, 2020, the Washington Department of Health (DOH) announced the first

1 case of COVID-19 in the state. Lofy Decl. ¶ 4. New cases increased quickly through March. *Id.*

2 **B. Washington State’s Response to COVID-19**

3 On February 29, the Governor issued Proclamation 20-05, declaring a State of
4 Emergency in Washington due to COVID-19. Declaration of Kathryn Leathers (Leathers Decl.),
5 ¶ 4, Ex. A; *see* RCW 38.52.050. With few proven therapeutics and no vaccine, a primary strategy
6 to slow COVID-19’s spread is social distancing measures designed to minimize interactions with
7 those outside one’s household. Lofy Decl. ¶¶ 10, 12. The State’s mitigation measures grew
8 stricter as cases and deaths accelerated. Leathers Decl. ¶ 10. They culminated with Proclamation
9 20-25 (the Stay Home Proclamation), which required people to cease leaving their homes except
10 for essential activities and essential business. Leathers Decl., Ex. C.

11 **C. The Risk and Costs of Mass Evictions**

12 From the outset of the pandemic, the Governor’s Office understood that the pandemic
13 would significantly reduce economic output and the income of many Washingtonians, making
14 many tenants unable to afford rent. *See* Declaration of Jim Baumgart (Baumgart Decl.) ¶ 8. Due
15 to a variety of reasons, a homelessness and housing instability crisis predated the pandemic in
16 Washington, where 21% of tenants were extremely low-income while affordable housing stock
17 declined by one-third since 2012. Baumgart Decl., Ex. A, E; Rowe Decl., Ex. B. Between 2013
18 and 2017, over 130,000 Washington adults faced an eviction, and by 2018 homelessness reached
19 Great Recession levels. Baumgart Decl., Ex. E. According to a 2017 survey of unlawful detainer
20 cases in Seattle, most evictions resulted in homelessness, with only 12.5% of evictees finding
21 “another apartment or home to move into.” Rowe Decl., Ex. C at 3.

22 Against that backdrop, the Governor’s Office anticipated that, without countermeasures,
23 the COVID-19 pandemic’s economic dislocations would result in mass evictions, exacerbating
24 homelessness and housing instability in Washington. Baumgart Decl. ¶ 8, Ex. J at 3. Such mass
25 evictions would imperil both the economy and public health. *Id.* ¶ 8. Mass evictions would not
26 only displace people from their residences at the very time that it was critical to stay home, but

1 also force many into congregate settings like shelters and over-occupied homes, further
 2 spreading COVID-19. *Id.*; Lofy Decl. ¶ 19. Research shows that a rise in evictions leads to
 3 significant increases in COVID-19 infections and deaths. Baumgart Decl., Ex. Q.

4 **D. The Governor’s Evictions Moratorium**

5 Given the likelihood and obvious dangers of mass evictions in the wake of the COVID-19
 6 pandemic, numerous state and local governments across the country took immediate action to
 7 restrict residential evictions during the pandemic. *See id.* On March 18, 2020, Governor Inslee
 8 issued Proclamation 20-19, temporarily prohibiting most residential evictions in Washington
 9 (the Moratorium). Leathers Decl., Ex. B. Correctly predicting COVID-19 to “cause a sustained
 10 global economic slowdown,” the Governor logically determined that “the inability to pay rent
 11 by these members of our workforce increases the likelihood of eviction from their homes,
 12 increasing the life, health, and safety risks to a significant percentage of our people from the
 13 COVID-19 pandemic.” *Id.* at 1. Originally set to expire on April 17, the Moratorium has been
 14 amended and extended three times as the pandemic and recession persisted. A forthcoming
 15 amended proclamation will extend the Moratorium until December 31. Leathers Decl. ¶ 20.

16 In crafting amendments to the Moratorium, the Governor’s Office sought input from a
 17 wide range of stakeholders, including residential property owners, managers, and landlords
 18 (collectively, property owners). Leathers Decl. ¶ 18. Based on their input, the Governor added
 19 several exceptions to protect property owners and induce tenants able to pay rent to do so.

20 In its current form, the Moratorium prohibits property owners from serving, seeking, or
 21 enforcing eviction notices or orders unless: (1) eviction is “necessary to respond to a significant
 22 and immediate risk to the health, safety, or property of others created by the resident;”¹ (2) the
 23 landlord intends to “personally occupy the premises as a primary residence” (and so notifies the
 24 tenant in writing at least 60 days in advance); or (3) the landlord provides notice of intent to “sell
 25 the property” (with the same notice requirement). Leathers Decl., Ex. H at 4.

26 ¹ “Property” was added to this list at the behest of some property owners. Baumgart Decl. ¶ 14.

Property owners sought a mechanism to collect unpaid rent during the Moratorium. Baumgart Decl. ¶ 15. As amended, the Moratorium provides one. Though it generally prohibits property owners from treating unpaid rent “as an enforceable debt or obligation that is owing or collectable,” that prohibition applies only when nonpayment was “a result of the COVID-19 outbreak and occurred on or after February 29, 2020.” Leathers Decl., Ex. H at 5. Thus, the Moratorium permits a landlord to take action short of eviction to collect unpaid rent that predated or is unrelated to the pandemic. The Moratorium also permits a landlord to collect unpaid rent if a tenant refuses or fails to comply with an offered “re-payment plan that was reasonable based on the individual financial, health, and other circumstances of that resident.” *Id.* This provision reflects the Moratorium’s general thrust to “provide relief to those individuals who have been impacted by the COVID-19 crisis” while encouraging property owners and tenants to “communicate in good faith . . . , and to work together, on the timing and terms of payment and repayment solutions.” *Id.* at 6. The Moratorium makes clear that tenants “who are not materially affected by COVID-19 should and must continue to pay rent.” *Id.* at 2.

E. The Safe Start Plan and the Continuing Crisis

On May 4, the Governor set forth a four-phase “Safe Start” reopening plan. Leathers Decl., Ex. D. After a surge in cases, in mid-July the Governor indefinitely paused the plan and extended the Moratorium until October 15, finding that the COVID-19 pandemic “continue[s] to threaten the life and health of our people as well as the economy of Washington.” *Id.*, Ex. E at 3. Since the pandemic began, over one million Washingtonians have filed unemployment claims, and the state’s unemployment rate has exceeded its Great Recession peak. Baumgart Decl. ¶ 7, Ex. H; Rowe Decl., Ex. D. The pandemic has forced 18,000 Washingtonians to rely on cash assistance programs and 129,000 to apply for food assistance. Baumgart Decl., Ex. I.

With the economy’s continuing fragility, housing instability remains a significant concern. According to Census survey data, 7.3% of renters in Washington (114,087 people) have fallen behind on their rent. Rowe Decl., Ex. E. And 14.4% of renters (226,000 people) reported

1 having little or no confidence in their ability to make rent. *Id.*, Ex. F. An analysis of this data
 2 found that 649,000 to 789,000 people in Washington (up to 10.3% the population) would be at
 3 risk of eviction by year end without the Moratorium. Baumgart Decl., Ex. N at 8. The University
 4 of Washington’s Institute for Health Metrics and Evaluation (IHME) projects that such mass
 5 evictions in would lead to 21,100 more COVID-19 cases, 1,177 more hospitalizations, and 348
 6 more deaths in the state. Declaration of Dr. Christopher J. L. Murray (Murray Decl.), Ex. B.

7 **F. Federal, State, and Local Rental Assistance Measures**

8 On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic
 9 Security (CARES) Act, which included \$150 billion in direct assistance for state, territorial, and
 10 tribal governments. Pub. L. No. 116–136, 134 Stat. 281. From this fund, in early August, the
 11 Washington Department of Commerce allocated more than \$100 million in Eviction Rent
 12 Assistance Program (ERAP) grants. Baumgart Decl. ¶ 11. Administered by local community
 13 organizations, ERAP funds provide up to three months of rent assistance to property owners on
 14 an eligible tenant’s behalf. *Id.* Cities and local authorities may run their own rental assistance
 15 programs, including as encouraged through certain tax programs under state law. *Id.* The CARES
 16 Act also imposed a 120-day national moratorium on evictions of renters participating in federal
 17 housing assistance programs or living in a property with a federally backed mortgage. Pub L.
 18 No. 116–136, § 4024, 134 Stat. at 492–93. That moratorium expired on July 24.

19 **G. The CDC Evictions Moratorium**

20 On September 4, the CDC adopted a nationwide eviction moratorium until 2021.
 21 Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed.
 22 Reg. 55,292-01. The CDC found eviction moratoria “an effective public health measure” that
 23 prevents the spread of disease by “facilitat[ing] self-isolation” and by “allow[ing] State and local
 24 authorities to more easily implement stay-at-home and social distancing directives[,]” and
 25 recognized that “housing stability helps protect public health because homelessness increases
 26 the likelihood of individuals moving into congregate settings, such as homeless shelters, which

1 then puts individuals at higher risk to COVID-19.” *Id.* at 55,292. The CDC moratorium prohibits
 2 property owners from evicting tenants who attest that they (1) have used “best efforts” to obtain
 3 government rent or housing assistance; (2) expect to earn no more than \$99,000 in annual income
 4 in 2020; (3) are unable to pay full rent due to substantial loss of income, reduced hours or wages,
 5 a lay-off, or medical expenses; (4) are “using best efforts to make timely partial payments” in
 6 light of “other nondiscretionary expenses”; and (5) would likely be rendered homeless or forced
 7 “to live in close quarters in a new congregate or shared living setting” if evicted. *Id.* at 55,293.
 8 The CDC moratorium does not apply wherever a state or local government’s evictions
 9 moratorium provides “the same or greater level of public-health protection.” *Id.* at 55,294.

10 **H. The Landlords’ Lawsuit**

11 The Landlords filed this lawsuit on September 3, 2020, nearly six months after the
 12 Governor issued the Moratorium. Plaintiffs El Papel and Berman 2 rent out multiple properties.
 13 Dkt. #1 ¶¶ 32, 39. Since the COVID-19 pandemic began, tenants in one of El Papel’s rental units
 14 and six of Berman 2’s units (of over 20 that each Landlord owns)² have fallen behind in their
 15 rent payments. Dkt. #18 ¶ 3; Dkt. #19, ¶ 5. Plaintiff Karvell Li owns a townhouse in Seattle that
 16 he has rented since June of 2017 in month-to-month tenancy. Dkt. #20, ¶ 4. Li’s tenant stopped
 17 paying rent consistently in June 2019, but he evidently declined to file an unlawful detainer
 18 action before the pandemic arrived. None of the Landlords appears to have sought a court
 19 declaration that any tenant was “offered, and refused or failed to comply with” a “reasonable”
 20 repayment plan based on the tenant’s “financial, health and other circumstances,” which would
 21 enable the Landlords to treat unpaid rent as an enforceable debt. Leathers Decl., Ex. H at 5. The
 22 Landlords provide no information regarding their tenants’ circumstances.

23 Inaccurately dubbing it an eviction “ban,”³ Dkt. #16 at 1 n.1, the Landlords mount a facial

24 ² State, King County, and City records reveal that El Papel owns property with a total of 27 rental units.
 25 Dkt. #24 ¶¶ 8–12, Exs. 7–11. In addition to the more than 20 units owned by Plaintiff Berman 2, two other
 26 Washington corporations—Berman 1 LLC, and Berman 3 LLC—share the same sole governor and registered agent,
 Osho Berman. *Id.* ¶ 3, Exs. 1–4. Those LLCs own two properties totaling four units. *Id.*, Exs. 5–6.

³ Because “[c]haracterizing something as a ban typically frames the challenged law as unconstitutional,”

1 challenge to the Moratorium under the Contracts Clause, U.S. Const. art. I, § 10, cl. 1, and the
 2 Takings Clause, *id.* amend. V. The Landlords also challenge the Seattle Moratorium and
 3 Repayment Ordinances on their face. They moved for a preliminary injunction, asking the Court
 4 to enjoin Defendants from enforcing the challenged orders and ordinances. Dkt. #16-1 at 1–2.

5 **III. ARGUMENT**

6 **A. Jurisdictional Bars Require Dismissal of Plaintiffs’ Claims Against the Governor**

7 Before reaching the merits of Plaintiffs’ motion, the Court must first consider the
 8 threshold question of jurisdiction. *See* Fed. R. Civ. P. 12(h)(3); *see, e.g., MacEwen v. Inslee*,
 9 No. C20-5423 BHS, 2020 WL 4261323, at *2 (W.D. Wash. July 24, 2020). At the preliminary
 10 injunction stage, the Landlords bear the burden of making a “clear showing” that subject matter
 11 jurisdiction exists. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Lujan v. Defs.*
 12 *of Wildlife*, 504 U.S. 555, 561 (1992). The Landlords cannot carry that burden because they lack
 13 standing and the Governor has sovereign immunity under the Eleventh Amendment.

14 **1. Plaintiffs lack standing**

15 The CDC moratorium leaves the Landlords without standing to challenge the
 16 Moratorium. To have Article III standing, the Landlords must demonstrate “as an irreducible
 17 minimum” that they have suffered (1) an injury in fact that is (2) “fairly traceable” to the
 18 challenged laws, and that is (3) “likely to be redressed by the requested relief.” *Lujan*, 504 U.S.
 19 at 590 (cleaned up). The traceability and redressability elements are not met “when there exists
 20 an unchallenged, independent rule, policy, or decision that would prevent relief even if the court
 21 were to render a favorable decision.” *Doe v. Va. Dep’t of State Police*, 713 F.3d 745, 756 (4th
 22 Cir. 2013); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (injury to
 23 plaintiffs must “be traced to the challenged action of the defendant”). If Washington’s and
 24 Seattle’s evictions moratoria were enjoined, the CDC moratorium would apply in Washington.

25
 26 “[o]ne need not be a full-fledged legal realist to recognize the possibility that calling something a ban reflects a conclusion of invalidity rather than a basis for it.” Joseph Blocher, *Bans*, 129 Yale L.J. 308, 315, 338 (2019).

1 See Mot. at 23. While the CDC moratorium protects a narrower subset of tenants, the Landlords
 2 fail even to allege—let alone make a “clear showing”—that their tenants could not meet the
 3 CDC’s requirements to avoid eviction. Like the Moratorium, the CDC moratorium will expire
 4 on December 31, 2020, so an injunction would leave the Landlords in the same position they are
 5 in now—unable to commence eviction proceedings this year.⁴ They lack standing.

6 **2. The Eleventh Amendment bars Plaintiffs’ claims against the Governor**

7 The second threshold barrier is the “jurisdictional bar of the Eleventh Amendment,”
 8 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996), which prohibits “federal courts
 9 from hearing suits brought by private citizens against state governments without the state’s
 10 consent,” *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1183 (9th Cir. 1997). The
 11 narrow exception articulated in *Ex Parte Young*, 209 U.S. 123, 157 (1908), permits suits for
 12 prospective injunctive relief against state officials only if they have a proven connection to
 13 enforcing the challenged law. See *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253
 14 (2011). The connection “must be fairly direct[,]” and “a generalized duty to enforce state law or
 15 general supervisory power over the persons responsible for enforcing the challenged provision”
 16 does not suffice. *L.A. Cnty. Bar Ass’n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992).

17 The *Ex parte Young* exception does not apply here because the Governor does not have
 18 a “fairly direct” connection to enforcement of the Moratorium. Under state law, the Governor
 19 has authority to issue an emergency proclamation, but enforcement power lies with others. If an
 20 official “cannot direct, in a binding fashion, the prosecutorial activities of the officers who
 21 actually enforce the law or bring his own prosecution, he may not be a proper defendant.”

22 ⁴ Neither the CDC moratorium nor the CARES Act moratorium was in effect from July 24, 2020 to
 23 September 4, 2020, so presumably the Landlords could allege a discrete economic injury from lost rent during just
 24 that period. However, not only would the Eleventh Amendment bar such a claim for damages against the Governor,
 25 see *Kentucky v. Graham*, 473 U.S. 159, 169 (1985), but the Landlords do not even seek any damages in this lawsuit,
 26 only injunctive and declaratory relief. Dkt. #1 ¶¶ 63–105. They therefore cannot establish standing on the basis of
 damages they do not—and cannot—claim. See, e.g., *Nader v. Saxbe*, 497 F.2d 676, 680 (D.C. Cir. 1974) (“Dismissal
 was . . . proper, for plaintiffs lack standing to sue[.]” where they “do not seek any relief, e.g., damages, for injuries
 already inflicted upon them by the allegedly unlawful policies” but seek “only prospective relief” that “will not
 remedy plaintiffs’ injuries”) (cleaned up) (citing *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972)).

1 *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004). “Were the law
 2 otherwise, the exception would always apply[]” and “[g]overnors who influence state executive
 3 branch policies (which virtually all governors do) would always be subject to suit under *Ex parte*
 4 *Young*.” *Tohono O’odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1311 (D. Ariz. 2015). As a
 5 court of this district recently noted in holding the Governor immune from a suit seeking to enjoin
 6 his COVID-19 proclamations, “[t]he power to promulgate law is not the power to enforce it.”
 7 *MacEwen*, 2020 WL 4261323, at *2 (quoting *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020)
 8 (holding same with respect to Texas governor’s COVID-19 orders)). The Landlords’ claims
 9 against the Governor must be dismissed for lack of subject matter jurisdiction.

10 **B. Preliminary Injunction Standards**

11 To obtain a preliminary injunction, the Landlords must make a “clear showing” that (1)
 12 they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the
 13 absence of preliminary relief; (3) the balance of the equities tips in their favor; and (4) an
 14 injunction is in the public interest. *See* Fed R. Civ. P. 65(b)(1); *Winter*, 555 U.S. at 20.

15 **C. Plaintiffs Are Unlikely to Prevail on the Merits of Their Claims**

16 **1. The Moratorium does not violate the Contracts Clause**

17 The Supreme Court has construed the Contracts Clause “narrowly in order to ensure that
 18 local governments retain the flexibility to exercise their police powers effectively.” *Matsuda v.*
 19 *City and Cnty. of Honolulu*, 512 F.3d 1148, 1152 (9th Cir. 2008) (citations omitted). Since the
 20 early 1930s, then, courts have “struck down state laws only infrequently” under the Contracts
 21 Clause. *Local Div. 589, Amalgam. Transit Union v. Massachusetts*, 666 F.2d 618, 638–39 (1st
 22 Cir. 1981) (Breyer, J.). A two-part framework now governs the analysis. Courts first ask
 23 “whether the state law has operated as a substantial impairment of a contractual relationship.”
 24 *Sveen v. Melin*, 138 S. Ct. 1815, 1821–22 (2018) (cleaned up). Only if a substantial impairment
 25 exists do courts proceed to the second step: “whether the state law is drawn in an ‘appropriate’
 26 and ‘reasonable’ way to advance ‘a significant and legitimate public purpose.’” *Id.* (quoting

1 *Energy Rsrvs. Grp. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–412 (1983)). The
 2 Moratorium—a temporary, carefully-crafted emergency measure—meets both steps.

3 **a. The Moratorium substantially impairs no contractual relationship**

4 Three factors govern the analysis of whether a law imposes a “substantial impairment”
 5 on a contractual relationship: “the extent to which” the law (1) “undermines the contractual
 6 bargain,” (2) “interferes with a party’s reasonable expectations,” and (3) “prevents the party from
 7 safeguarding or reinstating his rights.” *Sveen*, 138 S. Ct. at 1822.

8 **(1) The Moratorium does not undermine the contractual bargain**

9 The Moratorium does not undermine the Landlords’ contractual bargain with their
 10 tenants for a simple reason: their lease agreements do not provide that nonpayment of rent
 11 constitutes grounds for eviction. *See* Dkt. #18-1 (El Papel lease); Dkt. #19-1 (Berman 2 lease);
 12 Dkt. #20-1 (Li lease). The substantial impairment factor “focus[es] on the importance of the term
 13 which is impaired, not the dollar amount[.]” affected. *S. Cal. Gas Co. v. City of Santa Ana*, 336
 14 F.3d 885, 892 (9th Cir. 2003). Here, however, eviction for nonpayment is not a term at all.

15 Even if eviction for nonpayment were implied into the Landlords’ leases, the mere delay
 16 in the right to exercise a statutory remedy does not materially undermine the agreements. In
 17 *Home Bldg. and Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934)—the “leading case in the modern
 18 era of Contract Clause interpretation[.]” *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 15 (1977)—
 19 the Supreme Court upheld a Depression-era mortgage moratorium law extending mortgagors’
 20 redemption period for up to two years. The Court recognized that contractual obligations may
 21 be “impaired by a law which renders them invalid, or releases or extinguishes them,” such as a
 22 “state insolvent law” that wholly “discharge[s] the debtor from liability” for preexisting debts.
 23 *Blaisdell*, 290 U.S. at 431. The mortgage moratorium, however, did not impose such an
 24 impairment, for it represented a “temporary restraint of enforcement . . . to protect the vital
 25
 26

interests of the community[.]” from a “great public calamity.” *Id.* at 439.⁵

The same is true of the Moratorium here. As the *Elmsford* court explained in upholding New York’s eviction moratorium, it “does not eliminate the suite of contractual remedies available to the Plaintiffs; it merely postpones the date on which landlords may commence summary proceedings against their tenants.” *Elmsford*, 2020 WL 3498456, at *15.⁶ The Landlords’ claim that the Moratorium makes their “lease agreements unenforceable,” Mot. at 8, overlooks the fact that “tenants are still bound to their contracts,” and the Landlords may still “obtain a judgment for unpaid rent if the tenants fail to honor their obligations.” *Elmsford*, 2020 WL 3498456, at *15. Equally inaccurate is the Landlords’ assertion that the Moratorium “prevents [them] from treating overdue rent as an enforceable debt through breach-of-contract or similar actions.” Mot. at 10. In fact, the Moratorium expressly permits property owners to treat unpaid rent as an enforceable debt if they “demonstrate . . . to a court that the resident was offered, and refused or failed to comply with” a reasonable repayment plan. *Leathers Decl.*, Ex. H at 5. In this way and others, the Moratorium respects the benefit of the Landlords’ bargain.

(2) The Moratorium does not impair reasonable expectations

“The primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted.” *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997). The reasonableness of a party’s contractual expectations largely depends on “whether the industry the complaining party has entered has been regulated in the past.” *Energy Rsrvs. Grp.*, 459 U.S. 400 at 411.

⁵ The Landlords ignore *Blaisdell* and rely instead on nineteenth century cases, *see, e.g.*, Mot. at 9–10, “when the Contract Clause was regarded as an absolute bar to any impairment” of contracts. *U.S. Trust Co.*, 431 U.S. at 19 n.17. These anachronistic arguments overlook that *Blaisdell* “amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause[.]” *City of El Paso v. Simmons*, 379 U.S. 497, 508 (1965). This Court should reject the Landlords’ efforts to restore a “rigid,” *Lochner*-era jurisprudence deploying the Contracts Clause to “invalidate state legislation” for the general welfare. *U.S. Trust Co.*, 431 U.S. at 16.

⁶ *See also HAPCO*, 2020 WL 5095496, at *8 (Philadelphia moratorium is “only a minimal alteration of contractual obligations” because, “[a]s in *Blaisdell*, . . . it merely postpone[s] the date on which landlords may commence eviction proceedings and collect full rent”) (cleaned up); *Auracle Homes*, 2020 WL 4558682, at *17 (Connecticut moratorium does “not eliminate Plaintiffs’ contractual remedies for evicting nonpaying tenants; Plaintiffs instead have to wait before they may issue notices to quit or initiate summary proceedings.”).

1 This factor, too, undercuts the Landlords' claim. "[T]he landlord-tenant relationship is,
 2 if nothing else, heavily regulated." *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d
 3 732, 736 (7th Cir. 1987).⁷ Thus, an "eviction moratorium" cannot "operate as a substantial
 4 impairment of [the Landlords'] contractual rights," because it is not "wholly unexpected
 5 government" action. *Auracle Homes*, 2020 WL 4558682, at *17 (cleaned up); *see also HAPCO*,
 6 2020 WL 5095496, at *8 ("Against this heavily-regulated backdrop, it is doubtful that any
 7 impairment . . . has occurred as a result of the [eviction moratorium].") (cleaned up).

8 Moreover, none of the Landlords' lease agreements provides for nonpayment of rent as
 9 a ground for eviction. As the Supreme Court has held, "a reasonable modification of statutes
 10 governing contract remedies is much less likely to upset expectations than a law adjusting the
 11 express terms of an agreement." *U.S. Trust Co.*, 431 U.S. at 19 n.17. For this reason, too, the
 12 Moratorium does not substantially impair the Landlords' contractual relationships.

13 (3) Landlords may safeguard or reinstate their rights

14 The Moratorium allows the Landlords to protect their contractual rights and thus does
 15 not impair them. In *Sveen*, the Supreme Court held that a law altering contractual remedies
 16 without nullifying them does not "prevent[] the party from safeguarding or reinstating [their]
 17 rights." 138 S. Ct. at 1822. The Moratorium neither relieves tenants' obligation to pay all rent
 18 owed nor eliminates the Landlords' right to enforce that obligation. Rather, it merely requires
 19 them "to wait before they may issue notices to quit or initiate summary proceedings." *Auracle*
 20 *Homes*, 2020 WL 4558682, at *17. Because "the tenants are still bound to their contracts, the
 21 contractual bargain is not undermined and landlord rights are safeguarded." *HAPCO*, 2020
 22 WL 5095496, at *8. The Moratorium further mitigates the temporary burden by allowing
 23 property owners to evict if they sell or occupy the home. Leathers Decl., Ex. H at 5. Or they may
 24 offer a reasonable repayment plan and, if refused or violated, take steps to recover unpaid rent.

25
 26 ⁷ For example, Washington law regulates lease terms and conditions, security deposits and fees, and the
 grounds and legal procedures for evictions. RCW 59.18.230, 59.18.610, 59.12.030-.230, 59.16.010-040.

1 The Moratorium preserves landlord protections and imposes no substantial impairment.

2 **b. The Moratorium reasonably advances a significant public purpose**

3 Even if the Moratorium substantially impaired any contract, it still would not violate the
4 Contracts Clause under step two. A temporary emergency measure to prevent economic
5 dislocation and slow the spread of disease, the Moratorium furthers “a significant and legitimate
6 public purpose” in “an appropriate and reasonable way.” *Sveen*, 138 S. Ct. at 1822 (cleaned up).

7 **(1) The Moratorium’s purpose is significant and legitimate**

8 The Moratorium’s purposes—to “reduce economic hardship” of those “unable to pay
9 rent as a result of the COVID-19 pandemic” and “promote public health and safety by reducing
10 the progression of COVID-19 in Washington State,” *Leathers Decl.*, Ex. H at 2—are
11 undoubtedly significant and legitimate. *See S. Bay United Pentecostal Church v. Newsom*, 140
12 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting) (“California undoubtedly has a compelling
13 interest in combating the spread of COVID–19 and protecting the health of its citizens.”);
14 *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App’x 348, 353 (4th Cir. 2011) (“[T]he state’s
15 wish to prevent the spread of communicable diseases clearly constitutes a compelling interest.”).

16 The Landlords claim that the Moratorium “does not aim to resolve a broad and general
17 social problem,” but “instead reliev[es] one group of contractual obligations at the expense of
18 another.” *Mot.* at 11. Their argument defies credulity and reality. The manifest purpose of the
19 Moratorium is to protect the entire state from the economic and public health consequences that
20 would result from mass evictions. It does not relieve any obligations of tenants, who continue to
21 owe any unpaid rent. The Moratorium thus cannot plausibly be characterized as “special interest”
22 legislation. *Mot.* at 10 (quoting *Energy Rsrvs. Grp.*, 459 U.S. at 411–12). In *Energy Reserves*
23 *Group*, the Supreme Court explained that the “requirement of a legitimate public purpose
24 guarantees that the State is exercising its police power, rather than providing a benefit to special
25 interests.” 459 U.S. at 412. Virtually every law “regulating commercial and other human affairs
26 . . . creates burdens for some that directly benefit others[,]” but that does not make it

1 unconstitutional “whenever legislation requires one person to use his or her assets for the benefit
 2 of another.” *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223 (1986). Designed to avert
 3 an economic and public health catastrophe, the Moratorium is no more a “special interest” law
 4 than was the mortgage moratorium that passed muster in *Blaisdell*.

5 **(2) The Moratorium is reasonable and appropriate**

6 The only question is whether the Moratorium is a “reasonable” and “appropriate” to
 7 advance the State’s interests. The Court must “defer” to the Governor’s judgment as to the
 8 necessity and reasonableness of a particular measure” in answering that question. *Energy Rsrvs.*
 9 *Grp.*, 459 U.S. at 412–413 (cleaned up). And the “latitude must be especially broad” where
 10 “officials . . . act in areas fraught with medical and scientific uncertainties.” *S. Bay*, 140 S. Ct. at
 11 1613–14 (Roberts, C.J., concurring) (cleaned up). “Where those broad limits are not exceeded,
 12 they should not be subject to second-guessing by an unelected federal judiciary, which lacks the
 13 background, competence, and expertise to assess public health . . .” *Id.* at 1614 (cleaned up).

14 The Moratorium fits paradigmatically within the Supreme Court’s standard for a
 15 reasonable and appropriate law. Like the moratorium upheld in *Blaisdell*, the Moratorium is a
 16 response to an unprecedented “emergency which threaten[s] the loss of homes.” *Blaisdell*, 290
 17 U.S. at 444–45 (cleaned up). The Moratorium is “not for the mere advantage of particular
 18 individuals but for the protection of a basic interest of society,” that is, to prevent mass evictions
 19 and the spread of COVID-19. *Id.* Its terms are reasonable: it does not repudiate or reduce tenants’
 20 rent obligations, so their “indebtedness is not impaired[.]” *Id.* at 445. And the Moratorium is
 21 “temporary in operation[.]” and “limited to the exigency which called it forth.” *Id.* at 447. In
 22 sum, “as in *Blaisdell*, where [the Court upheld] temporary measures enacted in response to
 23 emergency conditions to allow people to remain in their homes[.]” the Moratorium advances
 24 important state goals in a reasonable, appropriate way. *HAPCO*, 2020 WL 5095496, at *10.

25 The Landlords illogically contend that the Moratorium is unreasonable because it does
 26 not compel “tenants . . . [to] continue making payments during” the Moratorium. Mot. at 11.

1 However, if a moratorium on eviction *for nonpayment* “required as a condition of . . . protection”
 2 that tenants “continue paying fair rent,” *id.* at 13, it would be no protection at all. Moreover, the
 3 Landlords’ attempt to read such a “continuing payments” requirement into *Blaisdell* falls flat.
 4 The moratorium there required mortgagors “to pay all or a reasonable part of . . . [the] rental
 5 value” of the property, as “determined . . . by the court . . . under all the circumstances, [to]
 6 appear just and equitable.” *Blaisdell*, 290 U.S. at 417 n.1. This was just one factor the Court
 7 identified in concluding that the moratorium was reasonable, *id.* at 446, and nothing suggests it
 8 was dispositive or represents a categorical rule for all moratorium cases—particularly one, like
 9 this, involving not only an economic crisis but also a public health emergency. In any event, the
 10 Moratorium provides a corresponding judicial process through which a property owner may treat
 11 unpaid rent as enforceable debt if a tenant refuses or violates a reasonable repayment plan.
 12 Leathers Decl., Ex. H at 7. Nothing in *Blaisdell* or the other Depression-era cases the Landlords
 13 cite⁸ supports their impractical theory that an emergency eviction moratorium designed to keep
 14 people at home during a pandemic constitutionally must condition protection on payment of rent.

15 The Landlords also argue that the Moratorium is not sufficiently “tailored” to the
 16 COVID-19 emergency because a “more moderate course would serve the government’s
 17 purposes equally well.” Mot. at 14 (quoting *U.S. Trust Co.*, 431 U.S. at 31). Their argument
 18 presumes that the Contracts Clause has a “least restrictive means” requirement. It does not.
 19 “[T]he appropriate test is not strict scrutiny, which would require that there was
 20 no less restrictive alternative to the terms of the Moratorium.” *Baptiste*, 2020 WL 5751572, at

21
 22 ⁸ Four of the five other cases Landlords cite were decided before *Blaisdell*, which “amounted to a
 23 comprehensive restatement of [Contracts Clause] principles[.]” *City of El Paso*, 379 U.S. at 508; see Mot. at 11–13
 24 (citing cases). The fifth, *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935), is distinguishable for several reasons.
 25 There, Arkansas enacted a moratorium on foreclosure on municipal bonds secured by mortgages (in which the state
 26 was an interested party), such that the mortgagee could not take possession of collateral for a “minimum” of 6.5
 years regardless of economic crisis’s duration. 295 U.S. at 63. The Court struck down the law, distinguishing
Blaisdell because the mortgagors in *Blaisdell* remained obligated to “pay the rental value of the premises as
 ascertained in judicial proceedings” and because the moratorium’s maximum forgiveness period was just two years
 (compared to 6.5 years) and did not extend “beyond the then existing emergency,” *id.* (quoting *Blaisdell*, 290 U.S.
 at 445). Here, the Moratorium is closer to *Blaisdell*’s than *Kavanaugh*’s because it will expire on December 31,
 2020 and thus will not “outlast the emergency” that necessitated it. *Blaisdell*, 290 U.S. at 447.

1 *19 n.10. The *HAPCO* plaintiffs argued that Philadelphia had to consider “more ‘moderate
 2 courses,’” “such as ‘reducing the eviction moratorium, . . . or making direct payments . . . under
 3 the CARES Act.” *HAPCO*, 2020 WL 5095496, at *9–10 (brackets omitted). The court rejected
 4 the plaintiffs’ proposed narrow tailoring requirement because the Contracts Clause “does not
 5 require courts . . . to sit as superlegislatures, choosing among various options proposed by
 6 plaintiffs.” *HAPCO*, 2020 WL 5095496, at *10 (cleaned up). Rather, at step two, courts ask only
 7 “whether the state law is drawn in an ‘appropriate’ and ‘reasonable’ way to advance ‘a significant
 8 and legitimate public purpose.’” *Sveen*, 138 S. Ct. at 1822 (cleaned up).

9 The Moratorium easily meets that deferential standard. The Moratorium “undoubtedly
 10 helps residents remain in their homes and, especially considering the COVID-19 pandemic
 11 during which it is critical that people . . . remain socially distant from each other, it is reasonable
 12 and appropriate for the City to ‘protect[] the mental and physical health of citizens who could
 13 suffer greatly by evictions.’” *HAPCO*, 2020 WL 5095496, at *10 (quoting *Troy Ltd. v. Renna*,
 14 727 F.2d 287, 298 (3d Cir. 1984)). This Court, too, should defer to the Governor’s judgment that
 15 a temporary moratorium on evictions is a “reasonable” and “appropriate” way to keep renters in
 16 their homes and slow the spread of COVID-19. *See id.* at *10.⁹

17 **2. The Moratorium does not violate the Takings Clause**

18 The Landlords are not entitled to a preliminary injunction under the Takings Clause for
 19 three reasons. First, the remedy for a taking is “just compensation,” not injunctive relief. Second,
 20 the Landlords’ takings claim is unripe because the Moratorium is temporary, not final. Third,
 21 the Moratorium does not constitute a physical taking under clear Supreme Court precedent.

22
 23
 24 ⁹ Though the Contracts Clause contains no “least restrictive means” requirement, all the alternatives the
 25 Landlords propose either have already been implemented or are impractical. *See Mot.* at 16. Neither eviction triage
 26 nor a cap on eviction filings would fulfill the Moratorium’s objective—to keep as many people as possible in their
 homes, away from public gatherings, and out of congregate settings, until the danger has passed. *See Mot.* at 16–
 17; Baumgart Decl. ¶ 13 (cap on evictions would be difficult to implement and ineffective). The Landlords suggest
 that the State “can also provide some form of compensation for landlords,” but the Governor has already provided
 \$100 million in ERAP funds, much of which were allocated directly to property owners. *Id.* ¶ 11.

a. Injunctive relief is not available to remedy a taking

The obvious problem with the Landlords’ request for a preliminary injunction on the basis of their takings claim is that “damages—not injunctive relief—are the proper remedy for a taking.” *Prof’l Beauty Fed’n of Cal. v. Newsom*, No. 2:20-cv-04275-RGK-AS, 2020 WL 3056126, at *8 (C.D. Cal. June 8, 2020). Because the Takings Clause only prohibits the state from taking private property for public use “without just compensation,” U.S. Const. amend. V, “[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking,” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *accord Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 740 (2010) (Kennedy, J., concurring). Washington has an adequate, effective procedure to compensate takings of property. *See* Wash. Const. art. I, § 16. If the Landlords had a viable takings claim (which they do not), their remedy would be damages, not injunctive relief.

b. Plaintiffs’ takings claim is unripe

The Landlords’ takings claim also fails because it does not satisfy the special ripeness requirement for such claims. Though the ripeness standard has changed in recent years, it remains that “‘the government entity . . . [must have] reached a final decision regarding the application of the regulations to the property at issue.’” *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 851 (9th Cir. 2001) (cleaned up). The Landlords cannot establish that the Moratorium represents a “final decision” by the Governor. *See, e.g., US West Commc’ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1126 (9th Cir. 1999) (takings claim unripe when challenged policy is “interim” policy and government has “not taken final action”). The Moratorium is by nature temporary and subject to modification. *See* Baumgart Decl. ¶ 18 (“[The Governor’s Office] continue[s] to consider the necessity of the evictions moratorium and ways we can better tailor it to minimize harms to all stakeholders.”); Leathers Decl. ¶ 21 (“The Governor’s Office continues to monitor evolving circumstances in light of new data and scientific analysis . . .”).

1 This ripeness requirement presents an insurmountable hurdle to the Landlords' takings claim.

2 **c. The Moratorium does not constitute a physical taking**

3 Finally, the Landlords' takings claim fails on the merits because the Moratorium's
 4 regulation of landlord-tenant relationships does not effect a *per se* physical taking. In *Loretto v.*
 5 *Teleprompter Manhattan CATV Corp.*, the Court held that it was a *per se* taking for the
 6 government to mandate a "permanent physical occupation of another's property." 458 U.S. 419,
 7 435 (1982). But the Court denied that this "physical occupation rule will have dire consequences
 8 for the government's power to adjust landlord-tenant relationships." *Id.* at 440. That "broad"
 9 power is perfectly compatible with the *Loretto* rule so long as the government does not authorize
 10 "the *permanent* occupation of the landlord's property by a third party." *Id.* (emphasis added).
 11 The Moratorium falls outside that "very narrow" rule, *id.* at 441, as cabined by its seminal case.

12 If *Loretto* had left any doubt that landlord-tenant regulations fall outside the physical
 13 occupation rule, the Court dispelled them in *Yee v. City of Escondido*, 503 U.S. 519 (1992). In
 14 *Yee*, mobile home park owners challenged an ordinance that, along with a state law, prevented
 15 them from either "set[ting] rents or decid[ing] who their tenants will be" or "evict[ing] a
 16 mobile home owner or easily convert[ing] the property to other uses." *Id.* at 526–27. This made
 17 "the mobile home owner . . . effectively a perpetual tenant of the park," according to the park
 18 owners. *Id.* They argued for a *per se* taking under *Loretto*, because "what has been transferred
 19 from park owner to mobile home owner is no less than a right of physical occupation of the park
 20 owner's land." *Id.* at 527. The Supreme Court unanimously rejected the park owners' expansive
 21 theory of physical takings. *See id.* at 532 (majority), 539 (concurrence). "The government effects
 22 a physical taking only where it *requires* the landowner to submit to the physical occupation of
 23 his land." *Id.* at 527 (majority). The mobile home park laws did "no such thing" because the park
 24 owners "voluntarily rented their land to mobile home owners." *Id.* In light of that acquiescence,
 25 the "laws at issue here merely regulate petitioners' *use* of their land by regulating the relationship
 26 between landlord and tenant," and thus do not constitute a physical taking. *Id.* at 528. The

1 Moratorium is the same: it simply regulates the landlord-tenant relationship by temporarily
 2 delaying the Landlords' recourse to the statutory remedy of eviction. Indeed, the *Yee* Court
 3 rejected the very argument the Landlords now make in claiming the Moratorium "force[s] [them]
 4 to keep their tenants," Mot. at 20. *Yee* held that, because the park owners "voluntarily open[ed]
 5 their property to occupation by others," they "cannot assert a *per se* right to compensation based
 6 on their inability to exclude particular individuals." 503 U.S. at 531. As in *Yee*, the Moratorium
 7 is just "one more example of government regulation of the rental relationship [that] does not
 8 constitute a physical taking." *Elmsford*, 2020 WL 3498456, at *8 (cleaned up).

9 **3. The Moratorium is constitutional under *Jacobson v. Massachusetts***

10 Under a straightforward application of traditional constitutional standards, the Landlords
 11 are unlikely to prevail. During this unprecedented public health emergency, however, a state's
 12 interests in protecting its residents are at their apex, tipping the scale in its favor. Thus, federal
 13 courts have developed a more deferential framework for constitutional claims against emergency
 14 health orders, a framework that Chief Justice Roberts has made clear applies in the current crisis.
 15 *See S. Bay*, 140 S. Ct. at 1613 (concurring). Derived from *Jacobson*, 197 U.S. 11, the standard
 16 allows states to "implement emergency measures that curtail constitutional rights so long as the
 17 measures have at least some 'real or substantial relation' to the public health crisis and are not
 18 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *In*
 19 *re Abbott*, 954 F.3d 772, 784–85 (5th Cir. 2020) (quoting *Jacobson*, 197 U.S. at 31); *see also*
 20 *Luke's Catering Serv., LLC v. Cuomo*, No. 20-CV-1086S, 2020 WL 5425008, at *7 (W.D.N.Y.
 21 Sept. 10, 2020) (applying *Jacobson* to Contracts Clause claim); *Prof'l Beauty Fed'n*, 2020 WL
 22 3056126, at *8 (applying *Jacobson* to takings claim). Deference is "especially" important when
 23 "a party seeks emergency relief . . . while local officials are actively shaping their response to
 24 changing facts on the ground." *S. Bay*, 140 S. Ct. at 1614 (Roberts, C.J., concurring).

25 The Moratorium easily passes the *Jacobson* standard. On its face, the Moratorium
 26 addresses an ongoing public health crisis. *See Abbott*, 954 F.3d at 787. And as explained above,

1 the Moratorium is constitutional, and certainly not “beyond all question, a plain, palpable
 2 invasion of [the Landlords’] rights.” *Jacobson*, 197 U.S. at 31. It is a temporary measure to
 3 address a once-a-century pandemic, and warrants deference to the expertise of “the politically
 4 accountable officials of the States.” *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

5 Because the Landlords are unlikely to prevail under either traditional standards or
 6 *Jacobson*, their Motion should be denied. *See, e.g., Recording Indus. Ass’n v. Diamond*
 7 *Multimedia Sys., Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999) (where plaintiff unlikely to prevail,
 8 court “need not consider . . . balance of hardships or . . . irreparable harm” requirements).

9 **D. Plaintiffs Have Failed to Establish Irreparable Harm**

10 The “single most important” *Winter* requirement is that the Landlords show they are
 11 “likely to suffer irreparable harm in the absence of preliminary relief.” *Chiafalo v. Inslee*,
 12 224 F. Supp. 3d 1140, 1146 (W.D. Wash. 2016) (cleaned up). The Landlords fail this
 13 requirement because their temporary loss of rental payments is an economic injury—by
 14 definition not irreparable—that Landlords can remedy through multiple non-injunctive means.

15 **1. Plaintiffs’ economic injuries are by definition not irreparable**

16 The Landlords’ alleged injury is economic, not irreparable. *See Colo. River Indian Tribes*
 17 *v. Town of Parker*, 776 F.2d 846, 851 (9th Cir. 1985) (“economic injury alone is not considered
 18 irreparable”). The Landlords do not claim to wish to sell or personally occupy their properties,
 19 and the Moratorium would not stop them doing so. The essence of the Landlords’ injury, then,
 20 is not a loss of property, but a temporary deprivation of rental payments. That injury is fully
 21 reducible to a dollar amount—indeed, reduced to the penny by the Landlords themselves:
 22 \$17,403.44 for El Papel, \$10,818 for Berman 2, and \$27,059.55 for Karvell Li. Mot. at 5–7.
 23 These temporary losses are “monetary injuries which could be remedied by a damage award,”
 24 *i.e.*, the hallmark of reparable harm. *L.A. Mem’l Coliseum Comm’n v. NFL*, 634 F.2d 1197, 1202
 25 (9th Cir. 1980); *see also Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“the temporary loss of
 26 income, ultimately to be recovered, does not usually constitute irreparable injury”).

1 There is no merit to the Landlords’ suggestion that their constitutional claims warrant a
 2 presumption that their economic harm is irreparable. Mot. at 21. Not only are the Landlords’
 3 constitutional claims highly dubious, *see supra* section III.A–C, but even a strong showing on
 4 the merits provides no substitute for the irreparable harm requirement. To meet it, a plaintiff
 5 “must demonstrate some likely irreparable harm in the absence of a preliminary injunction
 6 barring the challenged action, and not simply a constitutional violation.” *Sierra Club v. Trump*,
 7 379 F. Supp. 3d 883, 925 (N.D. Cal. 2019), *aff’d*, 963 F.3d 874 (9th Cir. 2020); *see also Johnson*
 8 *v. City of S.F.*, No. C 09-05503 JSW, 2010 WL 3078635, at *3 (N.D. Cal. Aug. 5, 2010) (“to the
 9 extent Plaintiff makes out a plausible claim for denial of his rights to the equal protection of the
 10 laws under the Fourteenth Amendment, the harm he alleges to have suffered is economic harm
 11 which is not irreparable as a matter of law”) (citing *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587
 12 F.3d 464, 484–85 (1st Cir. 2009)). The Landlords have failed to do so because their only injuries
 13 are purely economic, remediable in damages, and thus, by definition, not irreparable.

14 Nor does the involvement of real property make the Landlords’ injury any less
 15 compensable. *See* Mot. at 21. Courts routinely decline to find irreparable harm where injuries
 16 related to real property can be reduced to a measurable dollar amount. *See, e.g., Thomas v.*
 17 *Zachry*, 256 F. Supp. 3d 1114, 1122 (D. Nev. 2017) (finding partial loss of real property
 18 “compensable through monetary damages and declaratory relief”). Here, the Landlords have
 19 reduced their injuries to dollar amounts, Mot. at 5–7, so their injuries are not irreparable.

20 **2. The Landlords have adequate remedies outside of a preliminary injunction**

21 “Irreparable harm is traditionally defined as harm for which there is no adequate legal
 22 remedy, such as an award of damages.” *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053,
 23 1068 (9th Cir. 2014). Here, the Moratorium gives the Landlords an adequate remedy for
 24 addressing their economic harms. The Moratorium encourages property owners to offer tenants
 25 reasonable repayment plans. Leathers Decl., Ex. H at 6. If a property owner does so and a tenant
 26 refuses or fails to comply, the Moratorium allows the owner to take action to collect the unpaid

rent. *Id.* at 5. Moreover, business owners like the Landlords have access to multiple sources of relief, such as rental assistance programs that provide federal CARES Act funds to landlords. *See Baumgart Decl.* ¶ 11; *HAPCO*, 2020 WL 5095496, at *17–18 (cataloguing “myriad of programs currently protecting landlords from foreclosure” through federal and other sources). Together, these options provide “adequate compensatory relief” and confirm the reparability of the Landlords’ alleged harm. *Goldie’s Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 471 (9th Cir. 1984); *see also Sampson*, 415 U.S. at 90 (possibility of “adequate compensatory or other corrective relief . . . weighs heavily against a claim of irreparable harm.”).

All these sources of non-injunctive relief further compound the speculative nature of the Landlords’ assertion that “missed mortgage payments” could “damage their credit score or force them into foreclosure.” *Mot.* at 22; *see In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) (“Speculative injury cannot be the basis for a finding of irreparable harm.”). Without evidence of even a single missed mortgage payment, the Landlords’ assertions of non-economic harm are theoretical—and improbable in light of other governmental relief available to them. *See, e.g., HAPCO*, 2020 WL 5095496, at *18 (rejecting “speculation that the obvious result of a landlord’s inability to immediately collect all payments owed under the lease will lead to foreclosure”). The Landlords fail to show irreparable harm, and no injunction should issue.

E. The Balance of Equities and the Public Interest Weigh Against an Injunction

Given the grave economic and health dangers that would result from enjoining the Moratorium, both the balance of equities and the public interest weigh strongly against “employing the extraordinary remedy of injunction” in this case. *Winter*, 555 U.S. at 24.¹⁰

Enjoining the Moratorium would unleash tragic public consequences with which the Landlords’ economic harms cannot possibly compare. First, an injunction would lead to hundreds of thousands of evictions. *Baumgart Decl.*, Ex. N. A wave of evictions on its own

¹⁰ These final two *Winter* factors merge when a state official is a defendant. *See Slidewaters LLC v. Wash. Dep’t of Labor & Indus.*, No. 2:20-cv-0210-TOR, 2020 WL 3130295, at *5 (E.D. Wash. June 12, 2020) (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)).

1 would be a serious public harm, as exemplified by the testimony of struggling tenants on the
 2 precipice of losing their homes. *See* Declarations of Jody Wirtz, Mike Fulop, and Samantha
 3 Shurtz. Evictions inflict severe and lasting injuries and reduce children’s educational outcomes
 4 and social well-being. Baumgart Decl. ¶ 10, Ex. R. These impacts fall disproportionately on the
 5 poor and minorities. *Id.* ¶ 10. Second, the wave of evictions would force hundreds of thousands
 6 of people into unsafe and congregate settings—precisely at a time when colder weather is driving
 7 more people into crowded shelters already in short supply. Baumgart Decl. ¶¶ 5, 8, Exs. C, D.
 8 Third, as COVID-19 spreads more easily in congregate settings, infections would rise. Lofy
 9 Decl. ¶ 19; Murray Decl., Ex. B. The result would likely be hundreds of deaths and thousands
 10 more serious illnesses with potential long-term effects. Murray Decl., Ex. B.

11 All these public harms are incomparably greater than the Landlords’ temporary economic
 12 losses. The Landlords’ injury is a temporary loss of rent on one of multiple properties they own.
 13 Dkt. #24-1–11. It is of no consequence that the Landlords couch their economic injuries in terms
 14 of constitutional violations. The case the Landlords cite for their contrary suggestion involved
 15 Arizona’s denial of driver’s licenses to undocumented immigrants, not an economic injury like
 16 lost rent. Mot. at 22 (citing *Ariz. Dream Act Coalition*, 757 F.3d at 1069). Here, the Landlords’
 17 temporary loss of rent pales in comparison to the life-threatening harms that would befall tenants
 18 and all Washingtonians were the Moratorium enjoined.

19 Protecting the health, safety, and well-being of residents is a paramount state interest. As
 20 courts considering challenges to eviction moratoria in other jurisdictions have held, there is no
 21 contest between the public interests the Moratorium protects and the private economic interests
 22 driving the Landlords’ requested injunction. *See, e.g., Auracle Homes*, 2020 WL 4558682, at *21
 23 (“the balance of the equities and the public interest favor denying a preliminary injunction”).

24 IV. CONCLUSION

25 The Governor respectfully requests that the Court deny the Landlords’ motion for a
 26 preliminary injunction.

1 DATED this 14th day of October, 2020.

2 ROBERT W. FERGUSON
3 Attorney General

4 /s/Zachary Pekelis Jones

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will send notification of such filing to all counsel of record.

DATED this 14th day of October, 2020, at Seattle, Washington.

/s/ Brian H. Rowe

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